material degree. The case of *Davenport* v. *Apollinaris Company Limited*[2] was quoted by learned counsel for the accused, but I do not consider that this authority assists the accused. What the court had to decide in that case was whether the description "natural mineral water" applied to water, which had been subjected to a process for the purpose of making it fit for sale and consumption, which when offered for sale was in all essentials identical to the water as it existed in the spring from which it came, was a false trade description. Section 3 of the English Merchandise Marks Act, 1887 defines a false trade description as one which is false in a material respect as regards the goods to which it is applied. The English Court found that what was done did not amount to a false trade description. In his judgment, Channell J. mentioned at page 21 that the evidence appeared to be that water could not be preserved in the exact condition in which it was, and that it went through some process which preserved it as nearly as possible; that that was practically what the findings of the magistrate were, and the omission was an omission to state that it had gone through some processes for the purpose of preserving it as nearly as possible in its natural condition, the differences being, in the opinion of the magistrate, quite immaterial and unimportant. He came to the conclusion that the magistrate did not wrongly deal with the question that was before him. In this connection, it is pertinent to observe that, in considering whether the description amounted to a description which was false in a material respect, the learned judge considered the opinion of the magistrate that the omission to state that the water had gone through some processes for the purpose of preserving it as nearly as possible in its natural condition was quite immaterial and unimportant. I think that this is some support for my view that the expression "material" in section 5 of the 1972 Act should not be confined to its being regarded in quantitative terms. The materiality or importance of a false trade description in relation to the goods, the subject-matter of the charge, in my view, should also be a relevant consideration. As stated, viewed in this light, even if the contents of the animal fat found to be present on analysis were small in volume, it cannot be said that because of this a false trade description cannot be constituted thereby if the omission to state such an ingredient in the composition of the goods concerned is material or important in its composition.

For the reasons given, the second ground of appeal fails. Accordingly, the appeal of the accused against his conviction on the second charge is dismissed.

Order accordingly.

Solicitors: *Yong & Co.*

ORIENTAL BANK BHD. v. ABDUL RAZAK ROUSE

[O.C.J. (Abu Mansor J.) November 5 & 18, 1985]

[Kota Kinabalu – Originating Summons No. 100 of 1984]

Legal Profession – Advocate and solicitor acting for both parties – Conflicting interests – Undertaking to bank to register charge – Breach of undertaking.

Conveyancing – Charge against lands – Lawyer's promise to bank to register charge – Breach of undertaking.

The plaintiffs applied, *inter alia*, for an order that the defendant, an advocate and solicitor, do within 14 days register a charge for the sum of M$5 million in favour of the plaintiffs against two pieces of land in Kuala Lumpur. The plaintiffs granted a loan of M$5 million to one Datu Haji Abdul Salam (the borrower) on or about February 2, 1982. The loan was to be secured by charges against Sabah and Kuala Lumpur lands. The defendant who acted as solicitor for the plaintiffs was instructed by the plaintiffs to prepare and register the said charges. The charge against the Sabah lands but not the Kuala Lumpur lands was duly registered.

On April 30, 1982, the defendant wrote a letter to the plaintiffs "to request for your kind approval to release a further sum of Malaysian Ringgit Six Hundred Thousand Only (M$600,000) to enable us to redeem the charge on Dashrun Hotel Sdn. Bhd. properties held by Bank Bumiputra Malaysia Bhd. and to recharge the same in favour of your bank and also to settle some of the other creditors as stated in our client's application."

On May 3, 1982 in response to the defendant's request, the plaintiffs duly credited the $600,000 requested into the defendant's firm account. Despite this and the five reminders sent by the plaintiffs, the defendant failed to present the charge in respect of the Kuala Lumpur lands for registration.

The defendant, who was also acting for the borrower, said, *inter alia*, that since he was acting for both parties he had the duty to protect both parties' interests in this matter. The defendant further said that since the plaintiffs had only released M$3,837.500 out of the M$5 million loan with a security valued at $6.3 million (in Sabah lands) and whereas and on the other hand the borrower had to meet contractors' claims, he felt it was fair not to charge the Kuala Lumpur lands so that the borrower could use it to raise further funds from another bank.

The issue before the Court was whether the defendant in law did give an undertaking in his professional capacity and if he did was there breach of that undertaking?

Held; allowing the plaintiffs' application: the court was satisfied on the balance of probabilities that the defendant breached the undertaking he gave to the plaintiffs in his professional capacity and it applied the case of *T. Damodaran* v. *Choe Kuan Him*.(1)

[*Editorial Note*: The defendant filed Notice of Appeal to the Supreme Court on November 6, 1985.]

Cases referred to:

(1) *T. Damodaran* v. *Choe Kuan Him* [1979] 2 M.L.J. 267, P.C.
(2) *Geoffrey Silver & Drake* v. *Baines* [1971] 1 All E.R. 473, 475.
(3) *Ong Kim Khoon* v. *Gaya Filem Bhd.* [1979] 1 M.L.J. 79.
(4) *Moody* v. *Cox and Hatt* [1917] 2 Ch. 71.

ORIGINATING SUMMONS.

Joseph Lee Henn Shen for the plaintiffs.
Mrs. Mariati Robert for the defendant.

Cur. Adv. Vult.

Abu Mansor J. : The plaintiffs in their Originating Summons dated November 23, 1984, pray for an order that the defendant, Encik Abdul Razak Rouse, do within 14 days from the date of this order cause to be lodged for registration with the Land Registry, Kuala Lumpur, under the National Land Code a charge for the sum of five million ringgit ($5 m) in favour of the plaintiffs against the lands held under titles nos.:-

(a) Hakmilik Sementara (Daftar) No. 31890 No. 287 P.T. No. 1966 Section 41, Town and District of Kuala Lumpur; and

(b) Hakmilik Sementara (Daftar) No. 31891 No. 285 P.T. No. 1967 Section 41, Town and District of Kuala Lumpur;

and do within the said period produce to the plaintiffs a certificate from the said Land Registry stating that the said charge has been lodged for registration pursuant to his written undertaking contained in a letter dated April 30, 1982, written by the said Encik Abdul Razak Rouse to the plaintiffs and that the defendant do pay the costs of and occasioned by this application.

In support of their application their branch manager, Ismail Darus, filed an affidavit sworn on October 26, 1984, Enclosure (10), in which he deposed that the plaintiffs granted a loan of $5 million to Datu Hj. Abdul Salam bin Datu Harun (the borrower) on or about February 2, 1982 (Exhibit 'ID-1'). The loan was to be secured by charges against Sabah and Kuala Lumpur lands. The defendant who acted as a solicitor for plaintiffs was instructed by the plaintiffs to prepare and register the said charges. The charge against the Sabah lands, but not the Kuala Lumpur lands, was duly registered.

In respect of the Kuala Lumpur lands, however, on April 30, 1982 the defendant wrote a letter to plaintiffs (Exhibit 'ID-2') as follows:

"Re: Fixed terms loan of $5,000,000 to Datu Haji Abdul Salam bin Datu Harun

We refer to the above matter and write to request for your kind approval to release a further sum of Malaysian Ringgit Six Hundred Thousand Only (M$600,000) to enable us to redeem the charge on Dashrun Hotel Sdn. Bhd. properties held by Bank Bumiputra Malaysia Bhd. and to recharge the same in favour of your bank and also to settle some of the other creditors as stated in our client's application."

The Kuala Lumpur lands on which Dashrun Hotel stands are:

(a) Hakmilik Sementara (Daftar) No. 31890 No. 287 P.T. No. 1966 Section 41, Town and District of Kuala Lumpur; and

(b) Hakmilik Sementara (Daftar) No. 31891 No. 285 P.T. No. 1967 Section 41, Town and District of Kuala Lumpur.

It is not disputed that on May 3, 1982 in response to the defendant's request the plaintiffs duly credited the $600,000 requested into defendant's firm account. Though the said sum of $600,000 was paid to the defendant, the defendant failed to present the charge in respect of the Kuala Lumpur lands for registration. The plaintiffs sent five reminders as Exhibits 'ID-4' to 'ID-8' but the defendant has still to have it presented for registration as he promised in 'ID-2'.

The plaintiffs' counsel submitted that before an undertaking can be enforceable against the defendant it must be clear and unequivocal but the word "undertake" need not even be used. As authority plaintiffs' counsel cited the case of *T. Damodaran* v. *Choe Kuan Him*(1) where the facts are somewhat similar to the defendant's case in that it was a similar promise by the defendant's solicitor to pay over purchase money to vendor upon the registration of the transfer of certain piece of lands. The transfers were duly registered but no payment was made to the vendor.

The plaintiffs submitted that in this present case the defendant acted for the plaintiffs and he gave his professional undertaking as a solicitor (see *Geoffrey Silver & Drake* v. *Baines*[2]) in a letter written on his firm's letterhead. His undertaking can only be discharged by the due registration of the charge against the Kuala Lumpur lands.

The plaintiffs' counsel further submitted that the defendant after having given the undertaking when the borrower refused to have the Kuala Lumpur lands charged to the plaintiffs failed to inform the plaintiffs, his client, of that fact, (a matter which is not disputed by the defendant). The defendant instead took instructions from the borrower and began acting for the borrower in complete disregard of his undertaking and his duties towards the plaintiffs. The plaintiffs also submitted that in doing so he broke a cardinal rule of his profession by acting for two parties whose interests conflict in that he tried to serve two masters. In trying to do so he failed to discharge his undertaking.

In his defence the defendant filed an affidavit-in-reply and a further affidavit-in-reply sworn on March 11, 1985 and March 18, 1985 respectively. The defendant in his affidavit sworn on March 18, 1985 (second affidavit) stated in defence, in paragraph 3 thereof, that his firm on November 6, 1982 received a letter ('AAR-6') from M/s. Nicholas Fung Wong & Co., the then plaintiffs' solicitors, informing his firm that the plaintiffs had withdrawn the credit facilities extended to borrower after a Receiving and Adjudicating Order was made against him by the High Court, Kuala Lumpur, on July 12, 1982 and at the same time enclosing a Notice by Chargee in Case of Default although his firm had on October 21, 1982 written a letter ('ARR-4') to plaintiffs enclosing Architect's Certificate No. A21764 and requesting for the release of the nett amount of $232,500.00 shown in the said certificate. His firm also did receive a request by plaintiffs for refund of the sum of $600,000.00 which request was subsequently withdrawn by the plaintiffs and the plaintiffs did request him to proceed with the registration of the Kuala Lumpur lands ('ARR-10' dated January 14, 1983 – Enclosure (17)).

In paragraph 5 of his second affidavit he said that it was after the facilities were withdrawn and notice of the foreclosure was served on the borrower that the defendant received strict instructions from the borrower not to proceed with the registration of Kuala Lumpur lands. He used his discretion then and he channelled the funds he obtained to meet contractors' demand on the borrower. Since he was acting for both parties he said he had the duty to protect both parties' interests in this matter. The defendant further said since the plaintiffs had only released M$3,837.500 out of $5 million loan with a security valued at $6.3 million (in Sabah lands) and whereas and on the other hand the borrower had to meet contractors' claims he felt it was fair not to charge the Kuala Lumpur lands so that the borrower could use it to raise further funds from another bank.

The counsel for defendant alleged that as the plaintiffs had by their own action stopped the credit facilities section 68 of the Contracts Act applied which provides that if any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise the promisor is excused by the neglect or refusal to any non-performance caused thereby. In short what counsel was trying to say was just because the balance of the loan was temporarily withheld by plaintiffs from November 6, 1982 (Paragraph 3, Enclosure (17)) to January 14, 1983 ('ARR-10', Enclosure (17)), this was sufficient to relieve the defendant from having to perform his undertaking. She did not say, however, that the plaintiffs had waived the undertaking.

The issue before the Court was whether the defendant in law did give an undertaking in his professional capacity and if he did was there breach of that undertaking?

The position of the law on the subject is clearly set out in *Halsbury's* Laws of England (4th Edition) Vol. 44 at paragraph 255 thus:

"Enforcement of undertakings. Where a solicitor who is acting professionally for a client gives his personal undertaking in that character to the client or to a third person, or gives an undertaking to the Court in the course of proceedings, that undertaking may be enforced summarily upon application to the court. Before this remedy can be pursued it must be shown that the undertaking is given by the solicitor personally, and not merely as agent on behalf of his client. The undertaking must also be given by the solicitor, not as an individual, but in his professional capacity as a solicitor.

The jurisdiction is based upon the court's right to require its officers to observe a high standard of conduct; it is immaterial that no misconduct on the part of the solicitor is suggested. The solicitor cannot, therefore, defend himself on the ground that his undertaking is not enforceable as a contract against him, or on the ground that the application has been delayed. Nor will an undertaking given under a mistaken belief of having authority to fulfil it be set aside; nor can the solicitor withdraw from his undertaking save by

consent; but an undertaking given by mistake in too wide terms will not be enforced insofar as it was mistakenly given.

The undertaking must be clear in its terms. The whole of the agreement to which it relates must be before the court, and the undertaking must be one which is not impossible *ab initio* for the solicitor to perform. Nevertheless, an undertaking will be enforced against the solicitor even though, after it is given, the client dies or instructs the solicitor not to perform it, or changes his solicitor. If performance of the undertaking has been waived the undertaking will not be enforced afterwards. Similarly, if the undertaking is conditional, the condition must be fulfilled before the undertaking will be enforced."

The Court agreed with the submission of counsel for the plaintiffs that defendant's case is somewhat similar to the case of *T. Damodaran* v. *Choe Kuan Him* (*supra*) where the solicitor said he would pay over the purchase money to the vendor on a certain happening which took place. In defendant's case he gave an undertaking to have the Kuala Lumpur lands charged on the plaintiffs paying the $600,000.00 asked for and the plaintiffs performed their part of the bargain. In *T. Damodaran* v. *Choe Kuan Him*[1] Lord Diplock said:-

"The terms of the solicitor's undertaking are clear, unqualified and unequivocal. The event on the happening of which the money was to be paid took place on April 16, 1974, when the transfer of the lands was 'duly registered in the name of the purchaser Messrs. Syarikat Alor Merah Sdn. Bhd.' The failure to pay the balance of $182,200.00 is, on the face of it, a plain breach of the undertaking. There would seem to be no reason why in the instant proceedings, commenced on July 30, 1974, by Originating Summons against the solicitor to enforce the undertaking, the vendor should not recover judgment for the balance of $182,200.00 with interest from April 16, 1974."

As regards the defendant's alleged defence that he used his own discretion to protect the interests of both his clients, the Court also agreed with the submission of the plaintiffs' counsel that in doing so he is not relieved from his undertaking. True to say in his doing so he went into deeper waters and breached his undertaking to the plaintiffs which resulted in the Kuala Lumpur lands not being charged to the plaintiffs, the net result of which was that he was even instrumental to the borrower breaching his loan agreement ('ID-1'), Enclosure (11), containing definite schedule of payments – drawdowns – and it was not disputed that $3.8 million had already been paid out to the borrower without the security documentation having been completed. As to the temporary stoppage, if it can be termed such, it was of no consequence as the defendant was never relieved of his undertaking and according to the schedule of payments in 'ID-1' the last payment of $1.4 million would only be released by the plaintiffs on production of an architect's certificate which was only being sent on October 21, 1982 ('ARR-4') and the temporary stoppage and also the notice was in fact withdrawn ('ARR-10') and the defendant was requested to honour the undertaking given.

The position in which the defendant found himself in is well set out in *Ong Kim Khoon* v. *Gaya Filem Bhd.*[3] where Raja Azlan Shah F.J. said at page 81:

"It is impossible for the same person to give satisfactory service as the confidential and expert adviser of two parties with conflicting interests. The man who undertakes to serve two masters may easily find himself in a position where he must be false to one and possibly to both."

Indeed it was when the defendant tried to act for both masters that he found himself in this predicament, a fault brought by him upon himself as Scrutton L.J. said so and did so warn in *Moody* v. *Cox and Hatt*[4]:

"It will be his fault for mixing himself up with a transaction in which he has two entirely inconsistent interests ..."

The Court was satisfied on the balance of probabilities that the defendant breached the undertaking he gave to the plaintiffs in his professional capacity and it applied the case of *T. Damodaran* v. *Choe Kuan Him* (*supra*) which the Court is bound to follow and it then gave an order in terms as prayed by plaintiffs in their Originating Summons dated November 23, 1984 and costs.

The defendant appeals.

Claim allowed.

Solicitors: *Joseph Lee & Co.; Rayner & Co.*

PUBLIC PROSECUTOR v. PARAM CUMARASWAMY

[O.C.J. (Chan J.) January 3, 1986]

[Kuala Lumpur – Federal Territory Criminal Trial No. 39 of 1985]

Criminal Law and Procedure – Charge of sedition – Close of prosecution case – Whether prima facie case made out – Sedition Act, 1948, ss. 3(1) & 4(1) – Criminal Procedure Code (F.M.S. Cap. 6), s. 180 – Federal Constitution, art. 10.